Subject: Department of Homeland Security, Department of Health and Human Services: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) (collectively, the Departments) entitled “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” (RINs: 1653-AA75, 0970-AC42). We received the rule on August 16, 2019. It was published in the Federal Register as a final rule on August 23, 2019. 84 Fed. Reg. 44392. The effective date of the rule is October 22, 2019.

The final rule amends regulations relating to the apprehension, processing, care, custody, and release of alien juveniles. According to the Departments, the primary changes resulting from this rule are implementing an alternative licensing process for family residential centers, aligning parole for minors in expedited removal proceedings with all other aliens in expedited removal proceedings, and shifting responsibility for custody redeterminations for unaccompanied alien children from the Department of Justice to HHS. This rule contains provisions concerning care and placement of unaccompanied alien children, determining the placement of an unaccompanied alien child, and releasing an unaccompanied alien child from the Office of Refugee Resettlement (ORR), Administration for Children and Families, HHS. The rule also
contains provisions concerning transportation of an unaccompanied alien child, age determinations, and unaccompanied alien children’s objection to ORR determinations. The Departments further state that the final rule creates an alternative to the existing licensed program requirement for U.S. Immigration and Customs Enforcement (ICE) family residential centers.

According to the Departments, the rule replaces regulations that were promulgated in 1988 in response to a lawsuit filed in 1985 against the Attorney General and the Department of Justice’s legacy U.S. Immigration and Naturalization Service in *Flores v. Meese*, which was settled in 1997. The Departments state that since 1997, intervening legislation, including the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), have significantly altered the governing legal authorities relating to the detention, custody, processing, and release of alien juveniles. According to the Departments, this final rule adopts regulations that implement the relevant and substantive terms of the settlement agreement, consistent with HSA and TVPRA, with some modifications to reflect intervening statutory and operational changes while still providing similar substantive protections and standards.

Enclosed is our assessment of the Departments’ compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Janet Temko-Blinder, Assistant General Counsel, at (202) 512-7104.

signed

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Lane Murray
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Department of Homeland Security
The Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) (collectively, the Departments) included in the final rule a summary of the costs and benefits of the rule, as determined by the Departments. With regard to costs, the Departments state that the current operations and procedures for implementing the terms of the Flores v. Meese Settlement Agreement (FSA), the Homeland Security Act of 2002 (HSA), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) are the primary baseline against which to assess the costs and benefits for this rule. The Departments state that DHS and HHS already incur costs for these operations; therefore, they are not costs of this rule. According to the Departments, the changes resulting from this rule may result in additional or longer detention for some groups of minors. DHS estimates that the total number of minors in FY 2017 in groups that might have been detained longer was 2,787 and in FY 2018 it was 3,663.

DHS states that, while the above estimates reflect the number of minors in FY 2017 and FY 2018 in groups of individuals that would likely be held until removal can be effectuated, DHS is unable to forecast the future number of such minors that may experience additional or longer detention as a result of this rule, or for how much longer individuals may be detained because there are many other variables that may affect such estimates. DHS notes that resource constraints on the availability of bed space mean that if some individuals are detained for longer periods of time, then less bed space will be available to detain other aliens, who in turn could be detained for less time than they would have been absent the rule. DHS states it is unable to provide an aggregate estimate of the cost of any increased detention on the individuals being detained. DHS further notes that, to the extent this rule results in filling any available bed space at current family residential centers (FRC), this may increase variable annual costs paid by U.S. Immigration and Customs Enforcement (ICE) to operators of current FRCs.

Finally, DHS notes that, while additional or longer detention could result in the need for additional bed space, there are many factors that would be considered in opening a new FRC and at this time ICE is unable to determine if this rule would result in costs to build additional bed space. The Departments state that, if ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs to provide contracted services beyond current FRC capacity.
(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Departments prepared a Final Regulatory Flexibility Analysis. This analysis had six parts with the headings:

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. §§ 1532-1535

The Departments determined that this rule may not exceed the $100 million expenditure threshold in any 1 year when adjusted for inflation. The Departments state that UMRA excludes from its definitions of “Federal intergovernmental mandate” and “Federal private sector mandate” those regulations imposing an enforceable duty on other levels of government or the private sector which are a “condition of Federal assistance.” 2 U.S.C. §§ 658(5)(A)(i)(I), 7(A)(i). The Departments state that the requirements at issue here under FSA would impact governments or entities only to the extent that they make voluntary decisions to contract with the Departments. The Departments also state that compliance with any standards that are not already otherwise in place resulting from this rule would be a condition of ongoing federal assistance through such arrangements. Therefore, according to the Departments, this rule contains neither a federal intergovernmental mandate nor a private sector mandate.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On September 7, 2018, the Departments published a proposed rule. 83 Fed. Reg. 45486. The proposed rule provided for a 60-day comment period ending on November 6, 2018. According
to the Departments, the final rule adopts the proposed rule with some changes in response to comments. The Departments responded to comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Departments determined that the final rule does not create or change a collection of information; therefore it is not subject to PRA requirements. However, according to the Departments, the Administration for Children and Families (ACF), HHS, submitted a copy of the rule’s statutory and regulatory requirements to the Office of Management and Budget (OMB) for its review, as required by PRA. 44 U.S.C. § 3507(d). ACF received approval from OMB for use of its forms on June 26, 2019, with an expiration date of June 30, 2022 (OMB Control Number 0970-0278). Separately, the Departments state that ACF received approval from OMB for its placement and service forms on July 6, 2017, with an expiration date of July 31, 2020 (OMB Control Number 0970-0498), and a form associated with the specific consent process is currently pending approval with OMB (OMB Control Number 0970-0385).

Statutory authorization for the rule

The Departments promulgated this final rule under the authority of sections 301, 552, and 552a of title 5; sections 111, 112, 202, 251, 271, 279, and 291 of title 6; sections 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note, 1187, 1223, 1224, 1225, 1226, 1227, 1231, 1232, 1255, 1357, 1359, and 1362 of title 8; and sections 4002, 4013 of title 18. The Departments also cited the authority of part 2 of title 8, Code of Federal Regulations. In addition, the Departments included a section in the final rule entitled “Legal Authority” that states the authority under which it promulgated the rule.

Executive Order No. 12,866 (Regulatory Planning and Review)

The Departments state that this rule has been designated as a “significant regulatory action” that is economically significant under section 3(f)(1) of Executive Order 12,866. Accordingly, the Departments state that OMB has reviewed the rule.

Executive Order No. 13,132 (Federalism)

The Departments determined that this final rule does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.